SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 26, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Román, JJ.

1484-
1485 Banc of America Securities LLC, Index 600759/04
Plaintiff-Respondent,

-against-

Solow Building Company II, L.L.C.,
Defendant-Appellant,

Bank of America Corporation,
Defendant.

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Boies, Schiller & Flexner, LLP, Armonk (David Boies of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Robert F. Wise, Jr. of counsel), for respondent.

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Orders, Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 29, 2008, and December 19, 2008, which, inter alia, granted plaintiff's motion to enforce a stipulation of settlement and directed defendant to execute all the documents necessary to effectuate the settlement, modified, on the law, to delete the directive that defendant make a payment of $ 5 million to plaintiff, and to insert a directive that defendant's obligation to make such payment be submitted to arbitration, and otherwise affirmed, without costs.

The court properly enforced the June 2008 term sheet which

recited that it was binding and contained all material terms of the parties' settlement in principle. The requirements to execute the sublease agreement, ostensibly for defendant's benefit to avoid running afoul of a mortgage covenant, and other documents, were not material additions, but were merely intended to effectuate those terms that were material. In fact, plaintiff was ready to vacate the premises on the stipulated schedule, and agreed to turn over possession to defendant, through an affiliate created to honor the mortgage covenant under a sublease. Defendant, however, without stating a reason, refused to execute the settlement agreement.

Plaintiff likewise was not precluded from seeking enforcement despite not having surrendered by the "time is of the essence" deadline provided in the term sheet, since its insistence on defendant's first signing an acceptance of surrender as required by paragraph 23B of the lease (*see 99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1997]) was not a repudiation; in any event, the deadline was extended by agreement. The only reason the surrender did not occur on the scheduled date was defendant's refusal to sign the papers necessary to effectuate the transfer of possession. Under New York law, surrender of leased premises requires acceptance by the landlord in order to become effective (*Reisler v 60 Gramercy Park N. Corp.*, 88 AD2d 312, 318 [1982] ["Surrender does not occur

unless there is an unequivocal act of the tenant, accepted by the landlord"]).

The orders enforced a stipulation of settlement, i.e., the term sheet, pursuant to CPLR 2104, and did not confirm an arbitration award. Even if arguendo the orders referred to an award, they did not constitute premature judicial involvement with interlocutory or procedural arbitral rulings (*cf. Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276, 281 [1977]). Defendant did not raise any substantive issues before the arbitrator and waived any supposed procedural deficiencies (*see Morgan Guar. Trust Co. of N.Y. v Solow*, 114 AD2d 818, 822 [1985], *affd* 68 NY2d 779 [1986]). That is, the arbitrator's involvement and retention of jurisdiction over certain matters did not preclude enforcement in court, since defendant failed to present any arbitrable issues to the arbitrator despite the opportunity to do so. Of greater significance is the fact that the orders on appeal did not mention or confirm an arbitration award pursuant to CPLR article 75, but, rather, enforced a stipulation of settlement pursuant to CPLR 2104.

Inasmuch as the parties agreed to arbitrate disputes arising from the term sheet, however, the issue as to whether defendant was required to make a$ 5 million payment to plaintiff should be decided by the arbitrator (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997] ["New York courts interfere as

little as possible with the freedom of consenting parties to submit disputes to arbitration"] [internal quotation marks omitted]).

We have considered defendant's other contentions and find them unavailing.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Although I come to the same place as the majority, I get there by a different road. Explaining our divergence requires the relevant facts to be set forth at some length.

After years of contentious litigation in this action, plaintiff tenant and defendant landlord agreed to mediate their disputes before a retired federal judge, Nicholas H. Politan. In short order, those efforts resulted in an "Agreement in Principle," namely, a three-page "Term Sheet," dated June 10, 2008, designed to provide for a "global resolution and final disposition" of all pending litigation and claims. The Term Sheet provides that it is governed by New York law, that it is "a legal, valid and binding obligation, enforceable against [each party]," that "all material terms of the settlement in principle . . . are incorporated into this Agreement," that the parties intended to enter into a "definitive" agreement, a "Settlement Agreement," which "will incorporate such terms as may be necessary and appropriate to effectuate the settlement reflected in the [Term Sheet]" and that the Settlement Agreement "must be executed . . . by June 24, 2008, or a date thereafter mutually agreed upon." The Term Sheet also requires plaintiff "to vacate and surrender" 20 of the floors it leased by August 15, 2008 and the remaining 3 floors by September 15, 2008. In advance of the expiration of the lease on October 31, 2008, the parties also

agreed that "time is of the essence with respect to the Surrender Schedule, and that any delay in complying with this schedule shall be a breach of the Settlement Agreement." Although the term "surrender" is a defined term, the definition is tautological as it is defined to mean little more than "to vacate and surrender the premises." Paragraph 6 of the Term Sheet effectively provides for plaintiff to receive a total of $15 million from defendant, either through rent reductions for the lease's last three months or, at defendant's option, through a letter of credit in favor of plaintiff. Finally, paragraph 9 provides for "binding arbitration" before Judge Politan of "any disputes arising . . . with respect to this Agreement."

After agreeing to defer the date for execution of the Settlement Agreement, counsel for the parties drafted and negotiated a draft Settlement Agreement. As an August 15, 2008 letter from plaintiff's counsel to defendant's counsel states, "as of . . . August 13, we had reached agreement on all open terms, subject only to a final management review on both sides." Nonetheless, the bright prospect of finality raised by the Term Sheet soon dimmed.

Although the parties had agreed to extend the execution date to August 26, 2008, they did not agree -- at least not expressly -- to extend past August 15 the deadline for plaintiff to begin surrendering the premises. On August 15, defendant's counsel

informed plaintiff's counsel that defendant's management had not approved the draft. In a letter that same day, plaintiff's counsel expressed plaintiff's "surprise[] and chagrin[]" at being so informed, and stated that plaintiff's management had been willing that day both to execute the draft and surrender the specified 20 floors. Counsel further stated, however, that because defendant was not willing to execute the draft, plaintiff was not willing to proceed with the surrender. By letter dated August 19, 2008, defendant's counsel asserted that under the Term Sheet, plaintiff's time-of-the-essence obligation to begin surrendering the premises on August 15, 2008 was independent of the obligation of both parties to execute the Settlement Agreement by an agreed-upon date; plaintiff could have but did not negotiate for its surrender obligation to be contingent on execution of the Settlement Agreement; a substantial cause of the delay in executing the Settlement Agreement was plaintiff's "request for a material term never negotiated at the mediation -- terminating its obligations under the Lease prior to October 31, 2008"; defendant was and remained willing to accept surrender of the floors; and defendant would continue to work on coming to agreement on the Settlement Agreement.

As discussed below, the draft Settlement Agreement was not executed before the deadline for its execution, which was extended from August 26 to August 29, 2008. A key if not the

sole reason it was not executed is that the parties disagreed over whether, under the Term Sheet, the surrender of the premises entailed a termination of the leasehold as to the surrendered premises. A first draft of the Settlement Agreement, prepared by defendant's counsel, provided that the lease would remain in effect. Plaintiff, however, contended that under New York law, a "surrender" terminates a lease as to the surrendered premises. According to plaintiff, defendant's counsel informed plaintiff's counsel that defendant could not agree to any early termination of the lease because it was prohibited from doing so by mortgage covenants. In an effort to solve this problem, defendant's counsel proposed and drafted, subject to his client's approval, a sublease arrangement pursuant to which the lease would not terminate on surrender. Rather, pursuant to the terms of subsequent drafts of the Settlement Agreement, an affiliate of defendant would be created that would assume all of plaintiff's obligations under the lease and defendant would guarantee the affiliate's performance.

Although the parties continued to try to finalize an agreement after the letters of August 15 and 19, they were unsuccessful. Pursuant to paragraph 9 of the Term Sheet, as is memorialized in an August 28, 2008 letter from plaintiff's counsel to Judge Politan, plaintiff requested that Judge Politan hold a telephone conference on August 29. According to

plaintiff's counsel, defendant had offered no "specific explanation" for its refusal to sign the draft Settlement Agreement. During the telephone conference, which began at 2:00 p.m. on August 29, the Friday marking the start of the Labor Day weekend, Judge Politan directed defendant to advise him by 10:00 a.m. on Tuesday, September 2 of its objections to executing the draft Settlement Agreement. Judge Politan also stated that if he did not receive defendant's objections by that time, he would issue an order on September 3 directing defendant to execute the draft Settlement Agreement. Although defendant did not make any submission on September 2, Judge Politan did not issue the order. Rather, defendant's counsel requested that plaintiff's counsel ask Judge Politan to hold off to give defendant additional time to execute the draft Settlement Agreement voluntarily. Plaintiff agreed to the request and to have the order held until September 8.

On September 8, however, defendant's counsel sent Judge Politan a letter requesting that he not issue the order requested by plaintiff, but instead schedule an arbitration hearing. The five-page letter set forth defendant's legal position that plaintiff was required to surrender the 20 floors on August 15 regardless of whether the Settlement Agreement had been executed by that date. In addition, defendant objected that plaintiff could not both fail to surrender the 20 floors as required by the

Term Sheet and claim it was entitled under the Term Sheet to a $5 million rent reduction. Counsel contended as well that negotiations over the Settlement Agreement had taken longer than expected because plaintiff had requested terms not provided for in the Term Sheet, including "a form of staggered lease termination upon surrender of the premises." After raising additional issues, counsel argued, inter alia, that: the holiday weekend had impaired defendant's ability to lodge objections by September 2; no irreparable injury supported the requested relief, i.e., an order directing a form of specific performance, i.e., execution of the Settlement Agreement; and issuance of the order would not be "legally appropriate because it would involve imposing terms not requested in the [Term Sheet]."

That same day, plaintiff's counsel argued in a responsive letter that defendant had failed to identify within the time frame specified by Judge Politan any areas of disagreement regarding the language of the drafts of the Settlement Agreement, and asked Judge Politan to "enter an order" requiring defendant to execute the Settlement Agreement. Counsel went on to state plaintiff's belief that, "[a]s for the balance of the issues raised by [defendant's counsel's] letter," they were without merit. Although imprecise, the phrase "balance of the issues raised" must be understood to include defendant's objection to plaintiff's claim of entitlement to a $5 million rent reduction.

Counsel stated that a detailed response to those issues would be forthcoming and urged that "it would be appropriate for Your Honor to retain jurisdiction, following entry of the order, to resolve those or any other issues either party wishes to raise pursuant to paragraph 9 of the [Term Sheet]."

On September 9, Judge Politan issued an "Order by arbitrator" setting forth, inter alia, his determination that the issues raised by the parties in their September 8 letters "are not substantial and should not preclude the signing of the Settlement Agreement and . . . there is no substantive reason why the Settlement Agreement cannot be executed with the Arbitrator retaining jurisdiction under Paragraph 9 of the [Term Sheet]." Accordingly, Judge Politan ordered defendant to execute the draft Settlement Agreement forthwith and directed arbitration before him, at a date to be scheduled, of the "minor" issues raised in the September 8 letters.

When defendant did not immediately comply, plaintiff sought to compel it to execute the draft Settlement Agreement. In addition, plaintiff sought relief it had not sought from Judge Politan. That is, plaintiff sought an order requiring defendant to pay it the $5 million it claimed it was entitled to under the Term Sheet, and to execute the sublease provided for in the draft Settlement Agreement, acceptances of the surrender of the premises and a stipulation of discontinuance of this action.

Plaintiff did not commence a proceeding pursuant to article 75 of the CPLR to confirm Judge Politan's award as a preliminary step in obtaining this relief. Indeed, plaintiff has been careful not to refer to the September 9 "Order by Arbitrator" as an "award." Rather, two days after the order was issued, plaintiff sought the above-described relief by moving pursuant to CPLR 2104, via order to show cause, to "enforc[e] the settlement between the parties dated June 10, 2008," i.e., the Term Sheet.[1] As discussed below, defendant opposed the motion.

Ruling from the bench after oral argument, Supreme Court granted the motion. Although plaintiff was not seeking to confirm the September 9 award, Supreme Court expressed its "belief and position that Judge Politan's order is binding and enforceable." Supreme Court reasoned that "the term sheet which has been signed by both parties reflect[s] all the material terms of the settlement which means that there was a settlement agreement which is enforceable. What has been awaiting is the [implementing] documentation . . ., but there was a meeting of

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[1] Why plaintiff sought no relief pursuant to article 75 is unclear. Of course, however, an order that simply confirmed the September 9 award would not have provided plaintiff with the additional relief it sought, the relief it had not sought before Judge Politan. In addition, plaintiff may have determined that a proceeding to confirm so much of the September 9 award as directed defendant to execute the draft Settlement Agreement might be defeated on the ground that the award was not final (*see* CPLR 7511((b)(1)(iii); *Matter of Otto C. Prellwitz & Son* [*12-10 Thirtieth Ave. Corp.*], 24 AD2d 1030, 1030 [1965] [to be confirmed, arbitration award "must be final and definite"]).

the minds and there was an agreement by both sides as to how those issues should be resolved." After finding it "somewhat disingenuous" for defendant to argue that "delay" -- apparently delay by plaintiff in surrendering the premises -- constituted a breach by plaintiff when that delay "was to give [defendant's principal] the opportunity to sign the terms," Supreme Court concluded its explanation as follows: "As you know, it is within the power of the Court to order the execution of the written agreement which fully represents the terms of the stipulation, and I would just cite *Cost v Benetos* [277 App Div 880 (1950)], 97 NYS2d 799."

A written order, dated October 29, 2008, granting the above-described relief was issued and effectively amended by a second order, dated December 19, 2008, setting a different date for compliance, December 30, 2008. Prior to the issuance of the amended order, and after the lease expired by its terms on October 31, 2008, defendant deposited $5 million with the clerk of the court. It also executed, inter alia, a copy of the draft Settlement Agreement along with a "Statement of Protest" and deposited the document with the clerk. This appeal by defendant from both orders followed.

Defendant advances numerous arguments for reversal, in whole or in part, of the orders. Most of the arguments supporting reversal of so much of the orders as compelled execution of the

Settlement Agreement are set forth in the balance of this paragraph. While conceding the binding and enforceable character of the Term Sheet, defendant contends that Supreme Court was without authority to order execution of the draft Settlement Agreement because that document went beyond the Term Sheet and contained new and material terms to which it never had agreed. In this regard, defendant argues that the term "surrender" in the Term Sheet was not a term of art but was used in a colloquial sense that did not entail an early termination of the lease, and that the sublease provisions were proposed by its counsel in an attempt to accommodate plaintiff's improper insistence that the lease terminate as floors were surrendered. Accordingly, defendant maintains that it was free not to agree to the sublease provisions and should not have been compelled to execute any agreement containing those provisions. Relatedly, defendant argues that it should not have been required to execute the draft Settlement Agreement because plaintiff breached the Term Sheet when it failed to comply with its unconditional obligation to surrender the premises in a timely fashion. Defendant's other arguments include the contention that having elected to arbitrate the dispute, plaintiff was foreclosed from seeking any judicial intervention other than through a proceeding under article 75 of the CPLR to confirm a final arbitration award.

These contentions, however, are not preserved for review.

Indeed, with one exception, all of defendant's other arguments for reversal of so much of the orders as required it to execute the draft Settlement Agreement are not preserved for review. At oral argument before Supreme Court, defendant's counsel stated that "[t]he legal arguments . . . that can be advanced and [are] set forth in our papers are essentially two." The first argument was expressly limited to that branch of plaintiff's motion that sought to compel the $5 million payment. Counsel stated that the first legal argument "is that while one of [plaintiff's] request[s] is to enforce the provision requiring a payment of five million dollars which was part of a way of implementing the settlement agreement from June [i.e., the Term Sheet], [opposing counsel] accurately described my client's belief that there is a dispute still pending before Judge Politan regarding that payment . . . ." Counsel went on to explain that this dispute was the one that arose when plaintiff did not begin surrendering the premises on August 15. Counsel concluded his statement of the first legal ground as follows: "My client . . . would assert that [plaintiff] didn't vacate, and therefore my client shouldn't need to pay the rent rebatement. I believe that is in essence what my client would assert before Judge Politan. In any event, the legal point is that the matter was made before Judge Politan and [is] not here yet." The "second legal point" counsel raised was that a request for specific performance "ordinarily

require[s] a showing of some irreparable injury" and that plaintiff had not made such a showing.

Only this second legal point is an objection to plaintiff's motion for an order requiring execution of the draft Settlement Agreement. By its clear terms, the first legal point applies only to plaintiff's request for an order requiring the $5 million payment. Accordingly, in opposition to the request for an order requiring execution of the draft Settlement Agreement, defendant has preserved for review only the latter of these two arguments (*Murray v City of New York*, 195 AD2d 379, 381 [1993]).

To be sure, in opposition to plaintiff's motion, defendant submitted an affirmation by one of its attorneys that stated the relevant facts at some length. In doing so, the affirmation recounted defendant's position that plaintiff had failed to satisfy its obligation under the Term Sheet to surrender the premises in a timely fashion; the draft Settlement Agreement contained terms that differed from or added to those of the Term Sheet; and the Term Sheet required arbitration before Judge Politan of any dispute. The affirmation also stated that defendant had outlined in the September 8 letter to Judge Politan (a copy of which was among the exhibits to the affirmation) "the relevant legal principles that it believed prohibited the issuance of an order directing [it] to execute the [draft] Settlement Agreement." The affirmation, however, did not state

that defendant was embracing anew those same legal principles. More critically, at oral argument defendant never urged the court to deny the motion on the basis of either the positions recounted in the affirmation or the principles of law stated in the September 8 letter. Rather, at oral argument defendant expressly stated that the two legal arguments it advanced were the only legal arguments it was making in opposition to the motion.

I recognize that plaintiff has not objected on appeal that these arguments for reversal are unpreserved. I recognize, too, that certain of those arguments may be ones that defendant could be permitted to raise on appeal for the first time (*Telaro v Telaro*, 25 NY2d 433 [1969]; *Travelers Indemnity Co. v Ley*, 195 AD2d 35, 41 [1993]). For several reasons, however, I would nonetheless decline to review them on preservation grounds. In the first place, the conclusion that defendant preserved only the two arguments it advanced at oral argument before Supreme Court is inescapable. I am not much troubled, accordingly, that defendant had no occasion to address preservation in its reply brief. Second, preservation requirements serve important public goals of finality and judicial economy (*cf. People v Dekle*, 56 NY2d 835, 837 [1982]). At least the latter goal is served by declining to review defendant's arguments on preservation grounds. Regardless of whether the majority is correct in concluding both that the term "surrender" in the Term Sheet was

intended by the parties to be understood in a technical rather than a colloquial sense and that plaintiff's obligation to surrender was not unconditional, I think it far from clear that these issues can be resolved as a matter of law on the existing record. Third, the only reasonable conclusion is that defendant made a considered decision when it limited its opposition to the motion to the two legal grounds advanced at oral argument. After all, defendant was represented by highly capable counsel and the affirmation in opposition set forth at least the factual basis for the unpreserved contentions. As indicated immediately below, moreover, defendant reasonably could have determined not to advance those contentions.

Fourth, defendant may well have determined there was little if anything to be gained by pressing these contentions that Supreme Court should not order it to execute the draft Settlement Agreement. Success would not have invalidated Judge Politan's order. Rather, unless Judge Politan rescinded his order, denial of plaintiff's motion would only have postponed the day of reckoning on this issue. Defendant reasonably could have concluded that at the end of the day it was quite unlikely that Judge Politan would change his mind. After all, even putting aside for a moment that the expiration of the lease was imminent, defendant's principal objection to the terms of the draft Settlement Agreement is that the sublease provisions represent

material terms not contained in the Term Sheet and to which it never agreed. That may be a formidable legal objection, but just the same the sublease provisions hardly saddled defendant with an onerous burden. As Judge Politan undoubtedly appreciated, defendant's counsel proposed the sublease arrangement for precisely that reason.[2] By contrast, of course, defendant had much to gain by persuading Supreme Court not to order it to pay plaintiff $5 million.

Fifth, and relatedly, whether Supreme Court erred in ordering defendant to execute the draft Settlement Agreement appears to be a tempest in a teapot. Presumably, or so the parties seem to assume, the draft Settlement Agreement and other documents (the sublease and stipulation of discontinuance) executed by defendant under protest would be rendered legal nullities by an order from this Court reversing so much of Supreme Court's orders as required their execution. But it is not at all clear that either such an order or an order affirming Supreme Court's orders in this respect would directly affect the rights of the parties (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). As noted, defendant's principal objection to the draft Settlement Agreement is to its sublease provisions.

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[2]If the sublease provisions had been effectuated, moreover, defendant would have received the very benefit that it contends the surrender provisions were designed to provide, i.e., possession of the premises to prepare them to be leased anew promptly upon the expiration of the lease.

By the time the draft Settlement Agreement was executed under protest, the lease had expired by its own terms. The parties acknowledge in their briefs that the sublease provisions thereby were rendered moot, and defendant also concedes that the draft Settlement Agreement contained "provisions concerning surrender of premises that were moot by the time the court below heard the motion." Indeed, defendant acknowledges that "most of the material terms of [the draft Settlement Agreement] were obsolete by the time" Supreme Court issued its written order. Moreover, the parties concede the binding and enforceable character of the Term Sheet. Accordingly, determining whether Supreme Court erred in directing execution of the draft Settlement Agreement and the two other documents would appear to be pointless unless some provision of one of these documents that is *not* duplicated in the Term Sheet continues to have significance for the rights of the parties. We are not directed by the parties to any such provision.

Turning to defendant's contention that a showing of irreparable harm "ordinarily" is required and that plaintiff failed to make it, I would reject it because the Term Sheet, the contract at issue, is a stipulation of settlement enforceable under CPLR 2104.[3] Defendant cites no authority requiring a

[3]I do not understand defendant to contend that this argument is applicable to the provisions of the Term Sheet requiring the $5 million payment. Obviously, it makes no sense to require a

showing of irreparable harm to enforce a stipulation of settlement. Regardless of whether it might be appropriate in some other case, I see no reason to require a showing of irreparable harm in this case and defendant does not offer one (at least not one independent of its unpreserved claim that the Term Sheet contains new and material terms to which it never agreed).

I agree with the majority that the first "legal point" defendant raised before Supreme Court, that plaintiff's request for an order directing the $5 million payment provided for in the Term Sheet should be denied because a dispute over the payment was pending before the arbitrator, has merit. The dispute over the payment falls squarely within the broad arbitration provision of the Term Sheet requiring arbitration of "any disputes arising . . . with respect to this Agreement"; in its September 8 letter to Judge Politan, defendant disputed plaintiff's claim of entitlement to the payment and requested an arbitration hearing; plaintiff can only be understood to have included issues relating to this dispute within the issues it urged Judge Politan to retain jurisdiction over in its September 8 letter; and this dispute unquestionably was one of the "issues" Judge Politan retained jurisdiction over and ordered arbitrated in his

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showing of irreparable harm from a party seeking enforcement of a contractual provision for the payment of money.

September 9 order. Moreover, of course, just days before seeking judicial intervention, plaintiff had successfully sought and obtained a favorable ruling from Judge Politan pursuant to the arbitration provision of the Term Sheet (*see Roggio v Nationwide Mut. Ins. Co.*, 66 NY2d 260, 263 [1985] ["parties are not permitted to participate in arbitration on the merits and yet maintain a right to litigate the issues"]).

Plaintiff's various arguments in response are unpersuasive. According to plaintiff, there was no arbitrable issue for Judge Politan to resolve because, "despite being given ample time to do so, [defendant] never identified for Judge Politan any reason for its unwillingness to execute the Settlement Agreement." The most that can be said, however, is that defendant did not provide any such reasons before the expiration of the deadline Judge Politan had set, the morning of September 2. Albeit belatedly, defendant raised numerous issues in its September 8 letter. As defendant correctly contends, although Judge Politan could have found that its failure to comply with the September 2 deadline waived the contentions raised in its September 8 letter, Judge Politan did not so find. To the contrary, he ordered that the "issues raised in the letters of September 8, 2008 from both parties be subject to binding arbitration" at a date to be set.

Neither Judge Politan's characterization of the issues raised in the September 8 letters as "minor" nor plaintiff's

characterization of those raised by defendant as "separate" from the relief sought from Supreme Court are relevant to the arbitrability of the dispute over the $5 million payment. Similarly irrelevant is plaintiff's assertion that "there is no colorable question as to [its] entitlement to that payment." In essence, plaintiff argues that there is no dispute because the underlying legal questions (whether the term "surrender" was used in the Term Sheet in a colloquial sense or as a term of art and whether its right to receive the $5 million payment is conditioned on timely compliance with its surrender obligation) are easy questions that can and should be resolved in its favor as a matter of law. But we could not properly express an opinion on these questions even if we were to agree. A dispute committed exclusively to arbitration arose because and as soon as the parties disagreed on these questions.

Relying on *American Reserve Ins. Co. v China Ins. Co.* (297 NY 322 [1948]), plaintiff argues that because defendant did not move to compel arbitration it could not argue before Supreme Court that an arbitrable dispute existed that required denial of the motion to compel the $5 million payment. *American Reserve*, however, was decided under a section of the former Civil Practice Act, and plaintiff cites no case construing the CPLR to hold under these circumstances that the only defense is a good offense, i.e., that a party cannot oppose judicial intervention

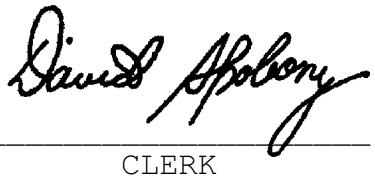
into a dispute on the ground that it is foreclosed by an arbitration agreement except by moving under CPLR 7503(a) to compel arbitration of that dispute. To reject defendant's opposition to judicial intervention into the dispute over the payment because it did not advance the same position in its own motion would both exalt form over substance and favor litigation over arbitration despite "the long and strong public policy favoring arbitration" (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997]). Finally, although plaintiff protests that defendant never pursued arbitration before Judge Politan after Supreme Court issued the orders requiring defendant to execute the draft Settlement Agreement and make the $5 million payment, plaintiff does not explain why defendant could not conclude that arbitration was pointless unless the orders were reversed or modified on appeal.

I would not address defendant's other arguments for reversal of so much of the orders as directed it to make the $5 million payment. Defendant expresses apprehension that although the release provisions of the draft Settlement Agreement do not apply to breaches of the Settlement Agreement and a failure by plaintiff to comply in timely fashion with its surrender obligation is defined to be a breach of the Settlement Agreement, plaintiff nonetheless will claim that it has been released of any liability for such a breach. Any dispute about the scope of the

release provisions, however, will be a matter for Judge Politan. Without expressing a position with respect to the scope of the release provisions, I note that by reversing so much of the orders as granted the motion to enforce and required defendant to make the $5 million payment, we permit the parties to arbitrate their claims relating to the payment.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Gonzalez, P.J., Friedman, DeGrasse, Manzanet-Daniels, Román, JJ.

2854 Er-Loom Realty, LLC, et al., Index 23343/04
Plaintiffs-Respondents,

-against-

Prelosh Realty, LLC, et al.,
Defendants-Appellants.

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Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellants.

DelBello Donnellan Weingarten Wise & Weiderkehr, LLP, White Plains (Patrick M. Reilly of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 14, 2009, inter alia, awarding plaintiff specific performance of a contract to sell real estate and related relief and denying defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff limited liability companies are the contract vendees of the two apartment buildings at issue in this action. Each company was formed by Prela Rukaj for the purpose of acquiring one of the buildings. Each defendant, also a limited liability company, is the contract vendor for one of the buildings. Prela's mother, Lena Rukaj, and the estate of his late father, Toma Rukaj, are the sole members of each defendant. In September 2001, Toma and Prela reached an understanding that

Toma would refinance the properties with 30-year mortgages and Prela would then purchase the properties in an installment sale with payments to be made when the mortgage payments came due. The parties contemplated that the sale would be structured to provide defendants with a net monthly payment of $16,500 after plaintiffs paid each mortgage installment. Prela, who took over management of the properties in September 2001, formed plaintiffs in 2002. In July 2002, defendants obtained the desired refinancing and the parties' attorneys began to prepare contracts of sale. The sale price was initially set at $4.25 million for both buildings, payable in monthly installments of $29,661 calculated to cover the mortgage payments and provide defendants with the contemplated $16,500 monthly net payments. In September 2002, two months before the contract was signed, plaintiffs began making the mortgage and installment payments. Following discussions with Prela's siblings, the purchase price was increased to $5 million payable in monthly installments of $17,000. The purchase agreement was executed at the office of defendants' counsel on December 18, 2002 by Prela on behalf of plaintiffs and Toma on behalf of defendants. The agreement, which was handwritten, incorporated two previously prepared typewritten agreements. The parties' attorneys, Lena and other family members were present when the agreement was signed. Consistent with the parties' understanding, the handwritten

agreement incorporated the typewritten agreements' payment schedules and price riders, which provided for net payments to defendants of $17,000 as set forth above. The agreement provided that the purchase price would be secured by a wraparound mortgage if the existing mortgagee consented, or by personal guarantees if the mortgagee did not consent. After signing the agreement, Prela continued making the monthly purchase price installment payments. This action for specific performance and money damages was commenced after defendants repudiated the agreement in April 2004.

In granting plaintiffs summary judgment, the motion court properly rejected defendants' claim that the transaction was not approved by majority votes of defendants' members pursuant to Limited Liability Company Law § 402. Defendants' acceptance of the benefits of the agreement in the form of the monthly installment payments constituted a ratification that undermines their argument that the transaction was unauthorized (*see Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [2008], *lv denied* 12 NY3d 713 [2009]). We are not persuaded by defendants' argument that the installment payments were made with their money in light of the unrefuted evidence that the cash flow from the buildings was insufficient to cover the operating expenses and the monthly payments. Their argument that the agreement was cancelled by its own terms is also unavailing. Here, defendants

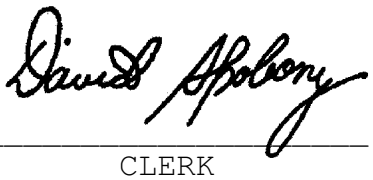
relied on language in the typewritten agreements that provided for cancellation of the sale on notice upon failure to obtain the mortgagee's consent to the transaction. That language was superseded by the handwritten agreement to the extent it provided for the giving of personal guarantees in the absence of the mortgagee's consent. The handwritten agreement presumably expressed the latest intention of the parties, and would control wherever it conflicts with the previously prepared typewritten agreement (*cf. Home Fed. Sav. Bank v Sayegh,* 250 AD2d 646, 647 [1998]).

Defendants have also failed to raise a triable issue of fact as to whether Toma had the mental capacity to enter into a binding contract on behalf of defendants. A party's competence to enter into a contract is presumed, and the party asserting incapacity bears the burden of proof (*Feiden v Feiden,* 151 AD2d 889, 890 [1989]). In this instance, defendants did not make a prima facie showing that any physical or mental condition rendered Toma incompetent to comprehend and understand the nature

of the transactions underlying the agreement (*see e.g. Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 369 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1915 The People of the State of New York, Respondent, SCI. 2170/03

-against-

Jerome Johnson, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), respondent.

_____

Order, Supreme Court, Bronx County (Robert Torres, J.), entered on or about December 13, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level three sex offender adjudication. Although defendant pleaded guilty to statutory rape (Penal Law § 130.25[2]) and not rape involving forcible compulsion, in determining the proper classification, the Board of Examiners of Sex Offenders is not limited to a defendant's admissions upon entering a plea but may consider reliable hearsay evidence

(Correction Law § 168-n[3]; *see People v Mingo*, 12 NY3d 563, 571 [2009]), including the risk level assessment instrument, victim statement, case summary and presentence investigation report (*see e.g. People v Dort*, 18 AD3d 23, 25 [2005], *lv denied* 4 NY3d 885 [2005]). Here, the finding of forcible compulsion is amply supported (*see People v Coleman*, 42 NY2d 500, 505-506 [1977] [significant is "not what the defendants would have done, but rather what the victim, observing their conduct, feared they would or might do if she did not comply with their demands"]); the superior court information includes the 13-year-old victim's statement that the 29-year-old defendant was aided by two unapprehended males who restrained and assaulted her (*see People v Wroten*, 286 AD2d 189, 199 [2001], *lv denied* 97 NY2d 610 [2002]).

As to other criteria, the drug or alcohol abuse factor was established by defendant's admission to corrections personnel that he had a "problem with marijuana" as well as by the results of a screening test for alcoholism (*see People v Gonzalez*, 48 AD3d 284 [2008], *lv denied* 10 NY3d 711 [2008]). The factor for lack of acceptance of responsibility was established by evidence that defendant denied responsibility for forcible rape and refused or was expelled from treatment programs (*see People v Lewis*, 50 AD3d 1567, 1568 [2008], *lv denied* 11 NY3d 702 [2008]). Finally, points were properly assessed under the lack of

supervision factor even though that circumstance resulted from defendant's having fully served his sentence (*see People v Tejada*, 51 AD3d 472 [2008]).

Defendant did not establish any basis for a downward departure.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

Defendant pleaded guilty to the sole count of a superior court information charging him with third-degree rape (Penal Law § 130.25[2]) for engaging in sexual intercourse with a person less than 17 years old. The majority upholds an assessment of 10 points for forcible compulsion even though defendant never was charged with rape by forcible compulsion in the superior court information, and an assessment of 15 points for refusing to accept responsibility because he denied he was guilty of a forcible compulsion rape. I disagree as to both assessments.

We can uphold the assessment for forcible compulsion only if the People met their burden of proving forcible compulsion by clear and convincing evidence (*see* Correction Law 168-n[3]). That is, we can uphold it only if the People proved it "highly probable" that defendant committed the rape by forcible compulsion (*see Matter of Poldrugovaz*, 50 AD3d 117, 127 [2008][internal quotation marks omitted]). The sole item of proof supporting this assessment is plainly hearsay, a statement in the felony complaint, albeit one sworn to by the victim, who was 13 years old at the time, to the effect that defendant committed the act of intercourse while another person held her down and a third person held her leg open. I agree with the majority that the assessment for forcible compulsion is not precluded by the fact that defendant was not charged in the

superior court information with forcible rape. Unquestionably, however, the fact that defendant was not charged with forcible compulsion is highly relevant and undermines the majority's position. Indeed, as the pertinent guideline states, "[T]he fact that an offender was *not* indicted for an offense may be strong evidence that the offense did not occur. For example, where a defendant is indicted for rape in the first degree on the theory that his victim was less than 11 years old, but not on the theory that he used forcible compulsion, the Board or court should be reluctant to conclude that the offender's conduct involved forcible compulsion" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, General Principle 7, at 5 [internal statutory citations omitted]).

The majority is hasty where it should be hesitant. Without explanation, it implicitly determines that this statement is alone sufficient to establish that it is highly probable that defendant used forcible compulsion. That determination is contrary to the common sense of the guideline. I note, too, that the felony complaint did charge forcible compulsion. Thus, the District Attorney clearly decided not to charge defendant with the crime that the majority decides that he in fact committed. In deference to the District Attorney, I think we should conclude, and I assume the majority agrees, that the District Attorney made a considered decision not to charge rape on a

forcible compulsion theory. Of course, it is not impossible that the District Attorney concluded that the evidence was sufficient to prove forcible compulsion rape but nonetheless decided not to charge defendant with that violent felony offense (Penal Law § 70.02[1][a]). But nothing that transpired at the SORA hearing indicates that the District Attorney so concluded. Given both that the class B felony of forcible rape is a very serious crime and that defendant has a prior violent felony conviction, the SORA record should provide a strong basis for concluding that the District Attorney permitted defendant to plead to a crime less serious than the one that could be proven.

As noted, the statement in the felony complaint is hearsay. Even assuming that because it is a sworn statement, it is reliable hearsay (*see People v Mingo*, 12 NY3d 563, 573 [2009] ["hearsay is reliable for SORA purposes . . . if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy"]), as it must be to support the finding (*see* Correction Law 168-n[3]), it does not follow that it is sufficient to constitute clear and convincing proof of forcible compulsion. But with respect to the question of whether it is reliable hearsay, I note that we know virtually nothing about the circumstances surrounding the development of this proof. In any event, the majority dilutes the clear and convincing evidence requirement in upholding this assessment.

That hearsay statement alone, from a 13 year old about whom we know virtually nothing, corroborated by nothing and not readily reconciled with the charging decision of the District Attorney, is insufficient to establish that it is highly probable that defendant used forcible compulsion.

With respect to the 15-point assessment under the acceptance of responsibility category, the People concede that they were required to show both that defendant has not accepted responsibility for his criminal conduct and has refused or been expelled from treatment. The only supposed evidence supporting the first prong is that defendant, who admitted to the police (in written and videotaped statements) that he had engaged in intercourse with the underage victim, waived indictment and pleaded guilty, denied committing the rape by means of forcible compulsion. Obviously, if I am correct that the evidence was insufficient to meet the People's burden on the issue of forcible compulsion, it follows that defendant should not have been assessed 15 points for denying the commission of a crime the People did not prove he had committed.

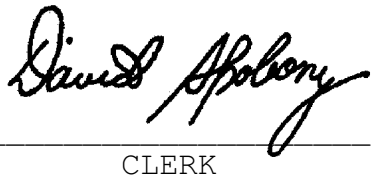
I agree with the majority that defendant's other contentions are without merit. I would add only that defendant's statement to a correction officer or officers that he had a "problem with marihuana" is an admission and thus is not, as defendant maintains, hearsay. Although the statement in the risk

assessment instrument that defendant had scored "alcoholic" on the "Michigan Alcohol Screening Test" is unexplained, the People met their burden under the history of drug and alcohol abuse category with that statement and defendant's admission.

Defendant would remain a presumptive level three offender even if we were not upholding the assessments for forcible compulsion and failure to accept responsibility. As I think a downward departure would still not be appropriate, I join with the majority in affirming the order adjudicating defendant a level three offender.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2495 Patricia Bendeck, Index 112884/07
Plaintiff-Respondent,

-against-

NYU Hospitals Center, etc., et al.,
Defendants-Appellants.

_____

Edwards Angell Palmer & Dodge, LLP, New York (Rory J. McEvoy of counsel), for appellants.

Brian Kennedy, New York for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 1, 2009, which denied defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

It is alleged in the complaint that defendants violated the State and City Human Rights Laws by retaliating against plaintiff for opposing discriminatory employment practices (*see* Executive Law § 296[7]; Administrative Code of City of NY § 8-107 [7]). On September 25, 2006, plaintiff began her six-month probationary period of employment as the Executive Assistant to defendant Johnson, the Senior Vice President and General Counsel of defendant NYU Hospitals Center (NYUHC). On December 1, plaintiff sent a coworker an e-mail accusing her of sexual harassment. The coworker immediately denied the accusation. Five days later, the

coworker and her office manager apprised Johnson of the accusation and the office manager gave Johnson a copy of the e-mail string. The underpinning of plaintiff's retaliation claims is set forth in the following account, in her brief, of a meeting she had with Johnson later that month: "Johnson stated at the outset of the meeting that she wanted Plaintiff to find another job upon learning of the possible sexual harassment claim and that Johnson was angry that Plaintiff's complaint had reached the Human Resources Department." Plaintiff's later attempt to retreat from this position is belied by her own testimony that Johnson had angrily summoned her to the office after having just received "a call from human resources that you're building a sexual harassment case." Johnson disputed plaintiff's retaliation theory, testifying that she merely asked plaintiff if she was making a sexual harassment complaint against the coworker and told plaintiff that she herself would have to report the incident to HR if she wanted to make such a complaint. According to Johnson, plaintiff said she was not making a complaint, did not want Johnson to get involved, and that the alleged sexual harassment had stopped.

Defendants moved for summary judgment on the grounds, among others, that (a) Johnson did not learn that HR was aware of plaintiff's accusation until after the December 2006 meeting, and (b) the termination of plaintiff's employment, which occurred in

March 2007, was based upon misconduct and poor work performance. The court denied the motion, finding issues of fact on the basis of plaintiff's deposition. We disagree.

In order to make out a claim of unlawful retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered adverse employment action based on her activity, and (4) there is a causal connection between the protected activity and the adverse action (*see Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 312-313 [2004]). To prevail on their summary judgment motion, defendants had to demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material fact as to whether their explanations were pretextual (*id.* at 305). Summary judgment should have been granted because the facts essential to the retaliation claims were negated by affidavits and documentary evidence *(Blackgold Realty Corp. v Milne*, 119 AD2d 512, 513 [1986], *affd* 69 NY2d 719 [1987]). Here, HR's awareness of plaintiff's sexual harassment accusation as of the time of her meeting with Johnson was pivotal to the retaliation claims. In this respect, the coworker's supervisor stated in his affidavit that it was not until January 2007 that he advised the coworker to communicate with HR

regarding plaintiff's accusation. The record contains a January 4, 2007 memorandum from the coworker to the Senior Vice President for HR, annexed to which are the coworker's memo to file outlining her interactions with plaintiff and the e-mail string. NYUHC's Vice President of Employee and Labor Relations acknowledged in his affidavit that the coworker's memorandum was forwarded to him on January 12, 2007. Accordingly, plaintiff has failed to raise a triable issue of fact as to whether she met her initial burden of establishing a prima facie case of unlawful retaliation.

Had a prima facie case of discrimination been established, the burden would have shifted to defendants to rebut a presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and nondiscriminatory reasons to support their decision to terminate plaintiff's employment (*see Matter of Miller Brewing Co. v State Div. Of Human Rights*, 66 NY2d 937 [1985]). Even assuming a prima facie case of unlawful retaliation, defendants would have easily met their burden through depositions, affidavits and documents that provided substantial and significant reasons to terminate plaintiff's employment. These reasons included poor work performance such as plaintiff's failure to address an ongoing problem with invoices punctuated by an insolent e-mail by which she told Johnson to handle the matter

herself; discourteous treatment of other employees; a report of plaintiff's refusal to sign for a package being delivered to the Vice Dean of Administration; and an affidavit and incident report detailing menacing behavior on part of plaintiff toward another employee. Contrary to the motion court's finding, plaintiff's unsupported assertions were insufficient to establish that defendants' reasons were pretextual (*see Forrest*, 3 NY3d at 308 n 6).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3440-
3441 The People of the State of New York, Ind. 5210/02
Respondent,

-against-

Kevin Anderson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Christina Graves of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondent.

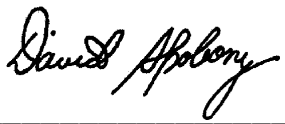
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J. at plea; John Cataldo, J., at sentence and re-sentence), rendered on or about April 3, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 26, 2010



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Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3443 The People of the State of New York, Ind. 3435/07
Respondent,

-against-

Segundo Tutiven,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about January 3, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

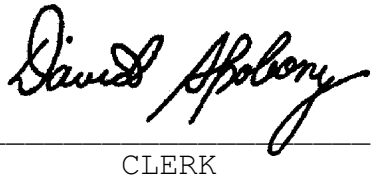
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3444 The People of the State of New York, Ind. 1934/08
Respondent,

-against-

Thomas Correa, etc.,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Carl S. Kaplan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

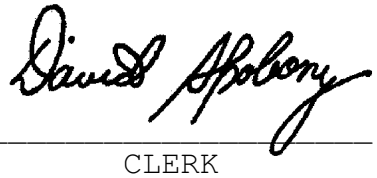
Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; James A. Yates, J. at plea and sentence), rendered December 4, 2008, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Police investigating a possible narcotics transaction in an apartment building had an objective, credible reason to make a common-law inquiry of defendant. The officers were in the stairwell of a crime-ridden location when defendant descended the stairs, made eye contact with one of the officers, grabbed at a large bulge in his pocket, and turned to walk back up the stairs

(*see e.g. People v Flores*, 226 AD2d 181 [1996], *lv denied* 88 NY2d 985 [1996]). The record fails to support defendant's assertion that the police saw the bulge only after they had already made a level-two inquiry, or his characterization of the police action in following him up a stairway as "pursuit." Instead, the police did no more than "follow defendant while attempting to engage him," which is within the scope of a level-two inquiry (*People v Moore*, 6 NY3d 496, 500 [2006]). When defendant engaged in additional suspicious conduct regarding the bulge in the pocket, the officers were justified in taking self-protective measures by removing him from the stairwell into the hallway and patting down the bulge, which led to the discovery of a firearm.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3445 The People of the State of New York, Respondent, Ind. 5942/08

-against-

Danny Sarita, Defendant-Appellant.

_____

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered August 25, 2009, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him to a term of 4 years, unanimously affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence established that defendant cut the victim's face with a sharp object. The fact that the jury acquitted defendant of another

charge does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

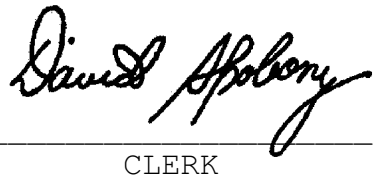
The court properly instructed the jury with regard to the theory of accomplice liability in connection with the gang assault charge, since the People were not required to specify in the indictment whether defendant was being charged as a principal, an accomplice, or both (*see People v Rivera*, 84 NY2d 766 [1995]). Indeed, in the opening statements the People put forth all three theories of liability. Defendant did not preserve his claims of surprise and improper amendment of the indictment, or any constitutional claim, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court properly exercised its discretion in denying defendant's mistrial motion based on a claimed impropriety in the prosecutor's summation, since, even assuming the prosecutor's remark was improper, the court's prompt curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). Defendant's remaining summation claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the

merits (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3446 In re Kieran Crowe, Index 115432/08
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

_____

Rae Downes Koshetz, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated July 22, 2008, finding petitioner guilty of sexual harassment and other misconduct and imposing a penalty of one year of dismissal, probation and suspension from duty without pay for 60 days, unanimously confirmed, the petition denied and the proceeding brought pursuant to article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered May 26, 2009) dismissed, without costs.

Substantial evidence of record supports the findings of the hearing officer. There is no basis to disturb the hearing officer's rejection of petitioner's explanations for his actions, or the hearing officer's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

We have considered the petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3448 In re Lisa S.,
Petitioner-Respondent,

-against-

Raymond S.,
Respondent-Appellant.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Kenneth M. Tuccillo, Hastings-on-Hudson, for respondent.

_____

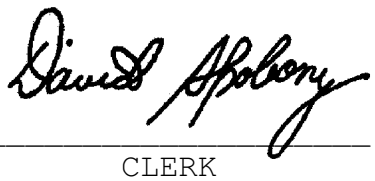
Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about October 28, 2009, which, upon a finding that respondent committed the family offenses of disorderly conduct and harassment in the second degree, granted petitioner's application for an order of protection against respondent, unanimously affirmed, without costs.

A preponderance of the credible evidence adduced at the hearing supported the court's determination that respondent committed the family offenses of disorderly conduct and harassment in the second degree, warranting the issuance of the order of protection *(see* Penal Law § 240.20[1]; § 240.26[3]; *see also* Family Court Act § 812). There exists no basis to disturb the court's credibility determinations (*see Matter of Hunt v Hunt*, 51 AD3d 924, 925 [2008]). Any error in admitting hearsay testimony that respondent abused his younger sibling was

harmless, as the court expressly limited its decision to respondent's actions towards petitioner alone (*see e.g. Matter of Daniel R. v Noel R.*, 195 AD2d 704, 708 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



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Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3449 The People of the State of New York, Ind. 4572/07
Respondent,

-against-

Jerry Williams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell, New York (Elyse Jones Cowgill of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at dismissal motion; Marcy L. Kahn, J. at jury trial and sentence), rendered September 29, 2008, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Defendant's pattern of conduct warrants the inferences that, acting with the intent that a drug sale occur, he intentionally aided the seller (*see* Penal Law § 20.00), and that he did so to benefit himself and not merely as a favor to the buyer (*see People v Rose*, 58 AD3d 544 [2009], *lv denied* 12 NY3d 859 [2009]).

The evidence before the grand jury did not warrant an

instruction on the agency defense.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3450 The People of the State of New York, Ind. 2025/06
Respondent,

-against-

Joseph Grant,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow and Adrienne Gantt of counsel), and Shearman & Sterling LLP, New York (Terence P. Gilroy of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at hearing; Arlene Goldberg, J. at jury trial and sentence), rendered November 7, 2007, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony, since the showup was not so unnecessarily suggestive as to create a substantial likelihood of misidentification (*see Manson v Brathwaite*, 432 US 98 [1977]; *People v Adams*, 53 NY2d 241 [1981]). Both the use of a showup and the manner in which it was conducted were justified by the exigencies of the case and the need for a prompt identification (*see People v Duuvon*, 77 NY2d 541 [1991]). The hearing testimony, and reasonable inferences that may be drawn therefrom,

establish that the on-the-scene showup occurred within the range of temporal proximity to the crime that is constitutionally permissible (*see People v Brisco*, 99 NY2d 596, 597 [2003]). The showup was not rendered unduly suggestive by factors "[i]nherent in any showup" (*People v Gatling*, 38 AD3d 239, 240 [2007], *lv denied* 9 NY3d 865 [2007]), including the victim's apparent awareness that he was viewing a possible suspect and the presence of police officers guarding defendant.

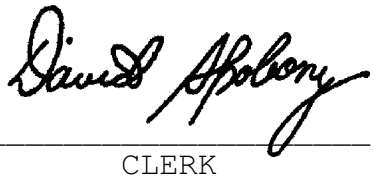
Although defendant claims that the court improperly denied his challenge for cause to a prospective juror, the record demonstrates that he only challenged the venireperson at issue peremptorily and not for cause. Regardless of what defense counsel may have been alluding to when he asked the court a question about this panelist, that was insufficient to preserve his present claim (*see People v Borrello*, 52 NY2d 952 [1981]), and any ambiguity was resolved when counsel expressly declined to make such a challenge to this panelist. Accordingly, defendant's claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The panelist's responses, viewed as a whole, provided an unequivocal assurance of impartiality (*see People v Chambers*, 97 NY2d 417, 419 [2002]).

Defendant was properly adjudicated a second violent felony offender. Defendant failed to show that the time he was in

custody for a parole violation was a period of wrongful incarceration that should not have been used for tolling purposes (*see* Penal Law § 70.06 [1][b][v]; *People v Love*, 71 NY2d 711 [1988]). Defendant did not substantiate any defect in his parole revocation proceedings, much less one that would require exclusion of this period from the tolling calculation.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3452&
M-4521 The People of the State of New York, Ind. 297/04
Respondent,

-against-

Edward Bowman,
Defendant-Appellant.

_____

Andrea Risoli, New York for appellant.

Edward Bowman, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sheryl Feldman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered August 3, 2006, convicting defendant, after a jury trial, of assault in the first degree, attempted robbery in the first and second degrees and conspiracy in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The accomplice's testimony

was sufficiently corroborated by that of the victim and by telephone records (*see e.g. People v Reome*, 15 NY3d 188, 192-193 [2010]). Defendant's acquittal of weapon possession charges does not warrant a different conclusion with respect to the sufficiency or weight of the evidence (*see People v Rayam*, 94 NY2d 557 [2000]). To the extent that defendant is raising a repugnant verdicts claim, that claim is likewise unpreserved and without merit.

By failing to object, or by objecting on different grounds from those raised on appeal, defendant failed to preserve his current objections to the admission of his testimony from a prior trial, statements from his proffer session, and the victim's additional testimony after being recalled to the stand, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Defendant's prior testimony was properly admitted as an admission (*see e.g. People v Jenkins*, 27 AD3d 372, 373 [2006], *lv denied* 7 NY3d 757 [2006]). Even if defendant's statements from his proffer session should have been admitted on rebuttal instead of the People's case-in-chief, the error was harmless (*see People v Crimmins*, 36 NY2d 230, 242 [1975]). As for the victim's additional testimony, "the order of proof at trial is committed to the sound discretion of the trial court" (*People v Caban*, 5 NY3d 143, 151 [2005]), and it was a provident exercise of

discretion under the circumstances presented to permit the People to reopen their examination of the victim (*see People v Hodge*, 308 AD2d 413, 414 [2003], *lv denied* 1 NY3d 540 [2003]), even after cross-examination (*see People v Delpilar*, 293 AD2d 365 [2002], *lv denied* 98 NY2d 696 [2002]).

Defendant was properly adjudicated a persistent violent felony offender. The court correctly applied the provision whereby the 10-year limitation on use of prior convictions is tolled for periods of incarceration (*see* Penal Law § 70.04[1][b][v]), and defendant's arguments to the contrary are without merit.

Since defendant received the minimum sentence permitted by law (*see* Penal Law § 70.08[2],[3][a-1]), this court has no authority to reduce it in the interest of justice. Defendant failed to preserve his argument that his mandatory minimum sentence was unconstitutionally excessive, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Rummel v Estelle*, 445 US 263, 271 [1980]; *People v Broadie*, 37 NY2d 100, 110-111 [1975], *cert denied* 423 US 950 [1975]).

M-4521 People v Edward Bowman

Motion seeking enlargement of time to file pro se reply brief denied.

We have considered and rejected defendant's pro se claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3453 The People of the State of New York, Ind. 1124/08
Respondent,

-against-

Troy Manners,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 12, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 3½ years, unanimously affirmed.

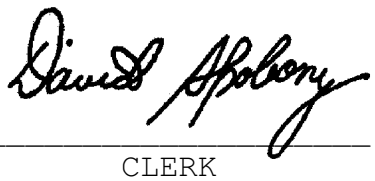
The court properly granted the prosecutor's for-cause challenge to a prospective juror whose strange responses to the court's and prosecutor's questions cast doubt on his mental competence to serve as a juror, a matter that the trial court was in the best position to evaluate (*see* CPL 270.20[1][b]; *People v Maxwell*, 2 AD3d 188 [2003], *lv denied* 1 NY3d 630 [2004]).

We reject defendant's argument that the court failed to make an adequate inquiry into what he characterizes as his implicit request for new counsel, made in the midst of trial. Defendant

never sought new counsel, but raised only a concern that counsel was not asking questions defendant wanted asked. The court made an exhaustive inquiry into the disagreement between defendant and counsel, explaining to defendant that certain decisions were for the lawyer, and counsel offered reasonable explanations for choosing not to ask defendant's proffered questions. Thus, to the extent defendant could be viewed as having made an implicit request for new counsel, the court's similarly implicit denial of that request was made after adequate inquiry and was a proper exercise of discretion, since mere disagreements with counsel over strategy are not good cause for substitution (*see People v Linares*, 2 NY3d 507, 511 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3454 Carlos Santiago, Index 303107/09
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants-Respondents.

_____

Mallilo & Grossman, Flushing (Francesco Pomara, Jr. of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for municipal respondent.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Milea Truck Sales Corp. and M.T.S. Realty Corp., respondents.

Law Offices of Peter D. Assail, LLC, New York (Peter D. Assail of counsel), for Cibao Meat Products Inc. respondent.

James J. Toomey, New York for 38-40 Food Corp., Luis Diaz and Pedro Rodriguez, respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 29, 2010, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

This Court affirmed the dismissal of plaintiff's first slip-and-fall action against these defendants as a sanction for plaintiff's "persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that was granted on default and became absolute" (71 AD3d 468, 469 [2010]). Plaintiff may not commence a new action

upon the same occurrence because that dismissal was "a dismissal of the complaint for neglect to prosecute the action" (CPLR 205[a]; *compare Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514 [2005], *with Estate of Yaron Ungar v Palestinian Auth.*, 44 AD3d 176 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3455 The People of the State of New York, Respondent, Ind. 2303/02

-against-

Trevor Simms, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 19, 2008, resentencing defendant, as a second felony offender, to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*see People v Murrell*, 73 AD3d 598 [2010]).

We have considered and rejected defendant's due process argument. Defendant's remaining claims are similar to arguments

that were rejected in *People v Williams* (14 NY3d 198 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3456 Benjamin Agrispin, Index 13379/04
Plaintiff,

-against-

31 East 12th Street Owners, Inc., et al.,
Defendants-Appellants,

Frank's Window Cleaning Co., Inc.,
Defendant,

Fiona Duff,
Defendant-Respondent.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Anna A. Higgins of counsel), for appellants.

Michael G. Kruzynski, Riverhead, for respondent.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered April 9, 2009, which granted defendant Fiona Duff's motion for summary judgment dismissing the cross claims of defendants 31 East 12th Street Owners and Buchbinder & Warren for contractual and common-law indemnity as against her, unanimously affirmed, with costs.

Plaintiff window washer fell while cleaning the outside of a window in Duff's cooperative apartment. He testified that the clip of his safety belt slipped from an anchor post affixed to the facade of the building. It is undisputed that Duff's proprietary lease placed the obligation to maintain the building's structural components on defendants. Contrary to

defendants' contention, there is no evidence in the record that raises an issue of fact whether any act or omission by Duff caused plaintiff's injuries and triggered the indemnity provisions of the lease. Duff hired plaintiff's employer, but she did not control or supervise plaintiff's work. Plaintiff's employer provided the safety equipment plaintiff used, which plaintiff inspected before beginning work and found both adequate and fully functional.

Defendants contend that plaintiff's injuries were caused by Duff's failure to comply with Labor Law § 202 and provide plaintiff with a safe means of cleaning her windows, as required by the "Window Cleaning" provision of the lease (¶ 30). However, their theory that there was a defect in plaintiff's safety belt is unsupported by any evidence.

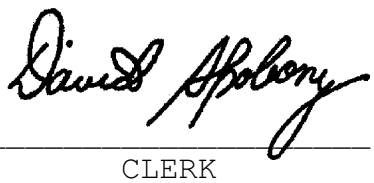
Contrary to the motion court's conclusion, the "Indemnity" provision of the lease (¶ 11) did not violate General Obligations Law § 5-321, since it did not obligate Duff to indemnify defendants for injury caused by their negligence. Paragraph 11 required Duff to indemnify defendants for injury caused by their negligence only when defendants were acting as agents for her, as provided in the lease, in which circumstance their negligence would be imputed to Duff. However, defendants' contention that they raised an issue of fact whether ¶ 11 was triggered by plaintiff's "visiting" in Duff's apartment, as that paragraph

provided, is unsupported by any evidence that plaintiff was doing anything other than cleaning Duff's windows.

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3457-
3458 In re Christy C.,

A Dependent Child Under the Age of
Eighteen Years, etc.,

Roberto C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), Law Guardian.

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 13, 2009, which, insofar as appealed from, after a fact-finding hearing, found that respondent father neglected the subject child, unanimously affirmed, without costs.

Contrary to the agency's argument that this appeal from the order of fact-finding should be dismissed, although a dispositional order was subsequently issued in this case, it was not a final order since it placed the child with the Commissioner of Social Services until the completion of the next scheduled permanency hearing. In any event, this Court has jurisdiction to hear this appeal since "[a]n appeal from an intermediate or final

order in a case involving abuse or neglect may be taken as of right" (Family Court Act § 1112[a]; *see Matter of Krystal F. [Liza R.]*, 68 AD3d 670 [2009]).

The finding of neglect was supported by a preponderance of the evidence, which established that the father failed to protect the child from the mother's erratic behavior brought on by her mental illness and substance abuse issues (*see Matter of Stephanie S. [Ruben S.]*, 70 AD3d 519 [2010]; *Matter of Miyani M. [George T.]*, 4 AD3d 430 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3459-
3460 Suzanne Dodson, Index 350353/05
Plaintiff-Respondent,

-against-

John Dodson,
Respondent-Appellant.

_____

John Dodson, Dobbs Ferry, appellant pro se.

Raoul Felder & Parnters, P.C., New York (Barry Abbott of counsel), for respondent.

Jo Ann Douglas, New York, Law Guardian.

_____

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered October 24, 2008, which, inter alia, awarded legal and primary residential custody of the parties' two children to plaintiff mother, and order, same court (Laura E. Drager, J.), entered May 5, 2009, which modified respondent father's access schedule to withdraw the provision for Tuesday overnight access, unanimously affirmed, without costs.

The determination that an award of custody to plaintiff is in the best interests of the children is amply supported by the record (*see Matter of Darlene T.*, 28 NY2d 391, 395 [1971]), which shows that, the prior neglect finding notwithstanding (*see* 57 AD3d 444 [2008], *lv dismissed* 12 NY3d 906 [2009]), respondent does not appreciate the extent of the emotional harm that his

conduct caused the children, he has continued to seek to alienate the children from plaintiff, and he remains unable to distinguish between his own interests and those of the children (*see Bliss v Ach*, 56 NY2d 995 [1982]; *David K. v Iris K.*, 276 AD2d 421, 422 [2000]).

The record demonstrates that respondent was given notice and an opportunity to be heard regarding the withdrawal of the Tuesday overnight access provision.

Respondent's argument that the court lacked authority to consolidate a neglect proceeding with the underlying custodial action was litigated and decided adversely to him (*see* 57 AD3d 444 [2008], *supra*) and is therefore precluded by the doctrine of res judicata (*Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]).

We have considered respondent's remaining arguments and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3462 The People of the State of New York, Ind. 3209/07
Respondent,

-against-

Kijuan Smith,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 4, 2008, convicting defendant, after a nonjury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 8 years, unanimously affirmed.

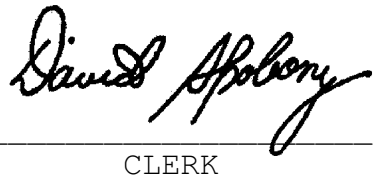
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The "[d]isplays what appears to be a . . . firearm" element of robbery in the first degree (Penal Law § 160.15[4]) was satisfied by evidence that defendant pressed a hard object, which the victim believed to be a handgun,

against the victim's waist while demanding money (*see People v Lopez*, 73 NY2d 214, 220 [1989]; *People v Groves*, 282 AD2d 278 [2001], *lv denied* 96 NY2d 901 [2001]).

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor should not have made a propensity argument regarding defendant's prior convictions, which had been admitted for impeachment only. However, we find that this argument did not deprive defendant of a fair trial, particularly since this was a nonjury trial where the trier of fact is presumed capable of disregarding such remarks (*see People v Khuu*, 293 AD2d 424, 425 [2002], *lv denied sub nom People v Thon* 98 NY2d 714 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3465 The People of the State of New York, Ind. 3569/09
Respondent,

-against-

Alexis Mendez, etc.,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Elaine Friedman of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Edward McLaughlin, J.), rendered on or about October 27, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

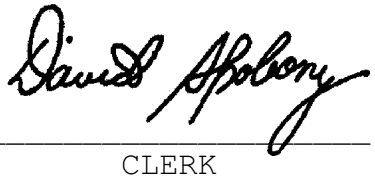
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3466 Adolfo De La Cruz, Index 13663/05
Plaintiff-Appellant,

-against-

Lettera Sign & Electric Co., et al.,
Defendants-Respondents.

_____

The Neveloff Law Firm, PC, New York (Daniel I. Neveloff of counsel), for appellant.

Camacho Mauro & Mulholland, LLP, New York (Kathleen Mulholland of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about July 10, 2009, which, in an action for personal injuries allegedly sustained when plaintiff slipped on an icy sidewalk abutting defendants' factory premises, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion for summary judgment denied, and the complaint reinstated.

The testimony of defendant company's president regarding the company's general snow and ice removal procedures fails to satisfy defendants' initial burden of showing that they acted reasonably and lacked notice of the icy condition. Because the president has no personal knowledge of any snow or ice removal efforts taken on the day of plaintiff's fall, his testimony is not probative of the care actually exercised by defendants on

that date (*see Martinez v Khaimov*, 74 AD3d 1031, 1033 [2010]; *Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [2009]), and because he has no personal knowledge of when defendants' employees last inspected the sidewalk or of the sidewalk's appearance before the accident, his testimony is not probative of lack of actual or constructive notice (*see Martinez*, 74 AD3 at 1033-1034; *Lebron*, 65 AD3d at 437; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259, 259 [2007]). Nor may defendants rely on their foreman's affidavit, which was improperly submitted for the first time in their reply (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1995]); in any event, the foreman's affidavit is framed in the conditional tense -- it speaks to what the foreman "would have" done in the way of snow removal on the date of plaintiff's accident, not to what he actually did -- and thus does not materially add to the president's generalized testimony about company's snow removal practices. Even assuming that defendants met their initial burden, plaintiff's testimony that, although the day of his accident was sunny, the sidewalk was covered with old ice and little or no snow, and the president's testimony acknowledging that defendants had last shoveled during the last snowfall before plaintiff's accident, raise issues of fact as to whether defendants' own snow removal efforts created or exacerbated the icy condition (*see Figueroa v West 170th Realty, Inc.*, 56 AD3d 299, 299 [2008]) and how long the icy condition had

existed (*see Lebron*, 65 AD3d at 437; *Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420, 421 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3467 Seaview Mezzanine Fund, LP, Index 603430/07
Plaintiff-Respondent,

-against-

Jeffrey S. Ramson, et al.,
Defendants,

Lipner, Sofferman & Company, LLP, et al.,
Defendants-Appellants.

_____

Babchik & Young, LLP, White Plains (Jordan Sklar of counsel), for appellants.

Smith Valliere PLLC, New York (Mark W. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 23, 2009, which, in an action alleging, inter alia, negligence and fraud, denied the motion of defendants accountants Lipner, Sofferman & Company, LLP and Randy Sofferman (Lipner defendants) to dismiss the amended complaint as against them, unanimously affirmed, with costs.

Plaintiff alleges that in deciding to make a loan of working capital to defendant Great Eastern Holdings, Inc. (Holdings), which was subsequently defaulted upon, it relied on misrepresentations and omissions made by the Lipner defendants concerning the financial conditions of Holdings and its wholly owned subsidiary, Great Eastern Securities, Inc. (Securities). The amended complaint alleges that prior to and during its due

diligence of Holdings and Securities' finances, plaintiff reviewed documents and information received from Holdings' accountants, the Lipner defendants. The amended complaint further alleges that the Lipner defendants were integrally involved in the due diligence process, boasted of their knowledge of the finances of Holdings and Securities, endeavored to ensure that the deal would close and knew that plaintiff intended to rely upon the information provided in determining whether to make the loan to Holdings.

Accepting the foregoing allegations as true and according plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we agree with the motion court that plaintiff has alleged the existence of a relationship sufficiently approaching privity so as to allow plaintiff to assert claims against the Lipner defendants in the absence of a direct contractual relationship (*see Security Pac. Bus. Credit v Peat Marwick Main & Co.*, 79 NY2d 695, 702-703 [1992]; *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985]; *John Blair Communications v Reliance Capital Group*, 157 AD2d 490 [1990]). Plaintiff also properly pled scienter, a necessary element to the causes of action for fraud. In this regard, plaintiff alleged that the Lipner defendants, inter alia, knowingly made false representations regarding the finances of Holdings and Securities, including exaggerating their net worth

and financial condition by underreporting a certain loan, failing to disclose the existence of another loan and misrepresenting the status of an arbitration proceeding. Accordingly, "the complaint contains some rational basis for inferring that the alleged misrepresentation[s] [were] knowingly made" (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [2003]).

We have considered the Lipner defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3469 In re China S. And Another,

- - - -

Tonia J., etc.,
Petitioner-Appellant,

-against-

Levon S.,
Respondent-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

John J. Marafino, Mount Vernon, Law Guardian for China S.

Dora M. Lassinger, East Rockaway, Law Guardian for Storm S.

_____

Order, Family Court, New York County (Lori Sattler, J.), entered on or about May 27, 2009, insofar as it denied Tonia J.'s petition for modification of the judgment of divorce, Supreme Court, Westchester County, dated August 8, 2003, awarding custody of the subject children, China S. and Storm S., to the respondent father Leon S., unanimously affirmed, without costs.

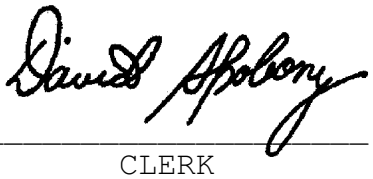
Family Court's determination that it was in the best interests of the subject children to remain in the sole legal and physical custody of the respondent father has a sound and substantial basis in the record (*see In re Ernestine L.*, 71 AD3d 510 [2010]). The court clearly examined and weighed numerous factors, relying on no single factor, including the quality of the home environment, the parental guidance provided, the ability

of each parent to provide for the children's emotional and intellectual growth, and the relative fitness of each parent (*Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]).

We have considered the remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3470 The People of the State of New York, Respondent, Ind. 4632/08

-against-

Ronald Gantt, Defendant-Respondent.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 26, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3 years, unanimously affirmed.

The court properly denied defendant's *Mapp/Dunaway* motion without a hearing since the allegations in his motion papers, when considered in light of the criminal court complaint and the voluntary disclosure form, failed to raise a factual dispute requiring a hearing (CPL 710.60[1],[3]). Defendant neither denied the drug sale that was the predicate for his arrest, nor

asserted any other basis for suppression (*see People v Jones*, 95 NY2d 721 [2001]; *People v Mendoza*, 82 NY2d 415 [1993]). We reject defendant's argument that he "implicitly" denied the sale. Even when read most favorably to defendant, his papers could be viewed, at most, as implicitly disputing the location of his arrest.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3471 Maria Fiorenza, Index 25444/04
Plaintiff-Appellant,

-against-

A&A Consulting Engineers, P.C.,
Defendant-Respondent,

S. Ainechi, P.C.,
Defendant.

_____

Annette G. Hasapidis, South Salem, for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Lee J. Sacket of counsel) for respondent.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered July 7, 2009, which, to the extent appealed from as limited by the briefs, granted defendant A&A's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In opposition to the prima facie showing that A&A (the remaining defendant in this action) had complied with its contractual obligations, plaintiff failed to raise a triable question of fact by offering competent evidence, in admissible form, that, if credited by a jury, would be sufficient to rebut the movant's proof (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Indeed, despite accusing A&A of various wrongdoing, plaintiff was unable to produce any documentary evidence or

affidavit, expert or otherwise, that A&A had somehow been deficient in the manner in which it performed its contractual obligations. Moreover, the February 5, 2004 contract between the parties included a limitation-of-liability clause, which is ordinarily enforced unless it expresses an intention to relieve a party of its own grossly negligent conduct (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). Plaintiff's claims of breach of contract against A&A, even if true, do not indicate a reckless disregard for the rights of others or smack of intentional wrongdoing such as would constitute gross negligence.

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ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3472-
3472A In re Barbara Meacham, etc., Index 103229/09
Petitioner-Appellant, 25879/03

-against-

New York City Health & Hospitals Corporation,
Respondent-Respondent.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered November 2, 2009, which, upon reargument, adhered to a prior order and judgment (one paper), same court (Sheila Abdus-Salaam, J.), entered April 14, 2009, unanimously reversed, on the law and the facts, without costs, and petitioner's application for leave to serve a late notice of claim granted. Appeal from the April 14, 2009 order and judgment, which denied petitioner's application and dismissed the proceeding, unanimously dismissed, without costs, as academic.

The lack of a reasonable excuse for failing to serve a timely notice of claim is not determinative (General Municipal Law § 50-e[5]; *see e.g. Pearson v New York City Health & Hosps. Corp. [Harlem Hosp. Ctr.]*, 43 AD3d 92 [2007], *affd* 10 NY3d 852 [2008]; *Bertone Commissioning v City of New York*, 27 AD3d 222, 224 [2006]). In any event, the delay here was short: petitioner moved less than a month after the statutory deadline for serving a wrongful death claim expired.

General Municipal Law § 50-e(5) requires the court to consider, "in particular, whether the public corporation or its attorney . . . acquired actual knowledge of the essential facts constituting the claim within [the statutory deadline] or within a reasonable time thereafter." As early as June 2008, petitioner had tried to serve a notice of claim for pain and suffering; the facts giving rise to that claim were the same as those giving rise to the instant wrongful death claim (*see Ramos v New York City Tr. Auth.*, 60 AD3d 517, 520 [2009]). Furthermore, as early as November 2008, petitioner had served a doctor's affidavit stating that the hospital records, on their face, evinced

departures from the standard of care (*see Lisandro v New York City Health & Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304 [2008], *lv denied* 10 NY3d 715 [2008]; *see also Talavera v New York City Health & Hosps. Corp.*, 48 AD3d 276, 277 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
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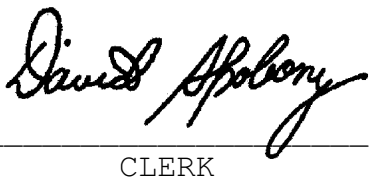


CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, JJ.

3474 Betania Guzman, by her mother and natural guardian, Maria Estrella, et al., Plaintiffs-Appellants, Index 29417/02

-against-

The City of New York, et al., Defendants-Respondents.

_____

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered on or about May 7, 2009, which, insofar as appealed from as limited by the briefs, in this action for personal injuries, granted defendant Board of Education's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Dismissal of the complaint was proper in this action where plaintiff, a severely mentally and physically handicapped individual, was injured when a fellow similarly handicapped student bit her index finger. The record establishes that defendant Board of Education had no specific knowledge or notice that the other student's actions could reasonably have been

anticipated (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Furthermore, the evidence shows that there were one teacher and four paraprofessionals assigned to the subject class that contained ten students and, under the circumstances presented, no amount of supervision could have prevented this sudden incident (*see Cranston v Nyack Pub. Schools*, 303 AD2d 441 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3475 The People of the State of New York, SCI 1125/04
Respondent,

-against-

Pete Colon,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

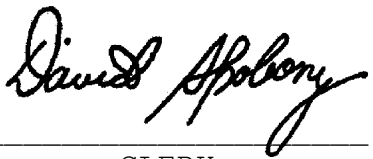
_____

Judgment of resentence, Supreme Court, Bronx County (John P. Collins, J.), rendered December 2, 2009, resentencing defendant to a term of 3 years, with 2 years' postrelease supervision, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46, and we perceive no basis for reducing defendant's term of postrelease supervision to 1½ years.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 26, 2010



CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3476 The People of the State of New York Ind. 891/09
Ex Rel. Shaun McManus,
Petitioner-Appellant,

-against-

Martin F. Horn, Commissioner
of the New York City Department
Of Corrections, etc.,
Respondent-Respondent.

_____

Robin Steinberg, The Bronx Defenders, Bronx (V. Marika Meis of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Martin Marcus, J.), entered on or about October 23, 2009, which denied petitioner's application for a writ of habeas corpus and dismissed the petition, unanimously affirmed, without costs.

The habeas court properly determined that the bail court (Steven L. Barrett, J.), was authorized to fix cash only bail.

Subdivisions (a) and (b) of CPL § 520.10(2) do not limit the discretion of a judge to direct that bail be posted in one form only.

THIS CONSTITUTES THE DECISION AND ORDER
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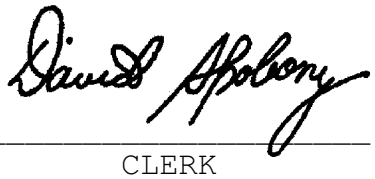
ENTERED: OCTOBER 26, 2010



CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, JJ.

3477 Frank Solano, Index 100389/01
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents,

Valdez Construction, Inc., et al.,
Defendants.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Jack L. Cohen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 6, 2009, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action and granted defendant Great American Construction Corp.'s cross motion for summary judgment dismissing that cause of action as against it, unanimously modified, on the law, to award summary judgment dismissing the Labor Law § 240(1) cause of action as against the City, and otherwise affirmed, without costs.

As the plywood plank that struck plaintiff had been deliberately dropped from a window it does not constitute a

"falling object" under Labor Law § 240(1) (*see Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002]; *see also Boyle v 42nd St. Dev. Project*, 38 AD3d 404, 407 [2007]). Accordingly, the Labor Law § 240(1) cause of action should be dismissed as against the City as well as against Great American (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]).

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ENTERED: OCTOBER 26, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3478-
3479 The People of the State of New York, Ind. 669/08
Respondent,

-against-

John Blum,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J. at plea and sentence), rendered on or about March 31, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 26, 2010

CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.